

Attorney Docket No.: J6855(C)  
Serial No.: 10/730,709  
Filed: December 8, 2003  
Confirmation No.: 3982

**BRIEF FOR APPELLANT**

Sir:

This is a Brief for appellant's Appeal in response to the Notice of Panel Decision from Pre-Appeal Brief Review mailed on June 18, 2009, concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; C.F.R. §1.136.

## **BRIEF FOR APPELLANT**

### **TABLE OF CONTENTS**

I.	REAL PARTY IN INTEREST	3
II.	RELATED APPEALS	3
III.	STATUS OF CLAIMS	3
IV.	STATUS OF AMENDMENTS	3
V.	SUMMARY OF CLAIMED SUBJECT MATTER	4
VI.	GROUND(S) OF REJECTION TO BE REVIEWED ON APPEAL	6
VII.	ARGUMENT	6
VIII.	CLAIMS APPENDIX	10
IX.	EVIDENCE APPENDIX	13
X.	RELATED PROCEEDINGS APPENDIX	13

## **I. REAL PARTY IN INTEREST**

The Real Party in Interest in this Appeal is Conopco, Inc., a corporation of the State of New York, d/b/a Unilever.

## **II. RELATED APPEALS AND INTERFERENCES**

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

## **III. STATUS OF CLAIMS**

This Appeal is taken from the Final Rejection of claims 1-6, 8-12, 14, 15 and 18, the pending claims in the application. A copy of the appealed claims is listed in this Brief as VIII. Claims Appendix.

## **IV. STATUS OF AMENDMENTS**

No Amendments after the Final Rejection have been filed.

## **V. SUMMARY OF CLAIMED SUBJECT MATTER**

The present invention relates to a skin care or cleansing packaged product, comprising:

- a. a container having a first chamber and a second chamber, each chamber having an outlet (see page 2, lines 32-35; claim 1(a));
- b. a composition contained in the first chamber having a dispersed phase including a first and a second component, the first component being capable of chemically reacting with the second component that is different from the first (see page 2, lines 36 to page 3, line 6; page 20, lines 27-29; claim 1(b));
- c. a continuous phase present in the composition composed of a substantially anhydrous carrier contained in the first chamber (see page 3, lines 7-8; claim 1(c));
- d. an organophilic particle stabilizer contained in the dispersed phase (see page 3, lines 12-13; claim 1(d));
- e. water contained in the second chamber (see examples 1-6, 8 and 9; claim 1(e));
- f. wherein the first component is substantially unsolvated in the carrier (see page 3, line 21; claim 1(f)); and
- g. wherein the first and second components do not substantially react with water or each other until dispersed or dissolved in water during cleansing and skin treatment by a consumer (see page 2, lines 19-25; and claim 1(g)).

Advantageously, the outlet of the first chamber and the outlet of the second chamber fluidly communicate with each other to allow mixing of the contents of the first and second chamber prior to deposition on the skin or hair of a user (see page 4, lines 29-32; claim 2).

In a preferred embodiment, the outlet of the second chamber do not fluidly communicate with the outlet of the second chamber whereby the mixing of the contents of the first and second chamber occurs after deposition of the contents of the first and second chamber on the skin or hair of a user (see page 4, lines 33-35; claim 3).

Preferably, the dispersed phase in the first chamber has less than 25% by wt. of the second component and less than 25% by wt. of the first component (see page 5, lines 5-7; page 20, lines 27-29; claim 4).

More preferably, a cup is releasably attached to the container and positioned for receiving the contents of the first chamber (see page 5, lines 7-8; claim 5).

Advantageously, the cup is marked with a fill line for introducing a measured amount of the contents of the second chamber (see page 5, lines 9-10; claim 6).

More preferably, the cup is positioned for receiving the contents of the second chamber (see page 5, lines 10-11; claim 8).

In another preferred embodiment, the package includes a unit does pump ( see page 5, line 11; claim 9).

Preferably, the outlet of the first chamber contains a one way valve (see page 5, line 12; claim 10).

More preferably, the valve is selected from a duckbill valve, a ball valve or a slit valve (see page 5, lines 13-14; claim 11).

Most preferably, at least one of the reactive components has a particle size range of about 0.1 to 5000  $\mu$  (see page 5, lines 15-16; claim 12).

Advantageously, the organophilic particle is in the particle size range of about 0.02 to 250  $\mu$  (see page 5, lines 24-25; claim 14).

Preferably, the stabilizer is selected from organophilic silica, organophilic clay, or blends thereof (see page 5, line 26; claim 15).

More preferably, the first component is capable of producing a gas in aqueous solution when reacted with an acid and the second component forms an acid in the presence of water (see page 5, lines 33-35; claim 18).

## **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

### **35 U.S.C. § 103(a)**

Claims 1-4, 12, 14, 15 and 18 were rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini, et al., (US 6,177,092) in view of Farrell, et al., (US 6,063,390) and Guilbeaux (US 4,929,644).

Claims 10 and 11 were rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini, et al., (US 6,177,092) in view of Farrell, et al., (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Gentile, et al., (US 6,161,729).

Claims 5-6 and 8 were rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini, et al., (US 6,177,029) in view of Farrell, et al., (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Hall, et al., (US 5,316,054).

Claim 9 was rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini, et al., (US 6,177,092) in view of Farrell, et al., (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Pettengill (US 5,020,694).

## **VII. ARGUMENT**

### **35 USC §103 (a)**

The examiner's rejection of claims 1-4, 12, 14, 15 and 18 under 35 U.S.C. 103(a) as being unpatentable over Lentini, et al., (US 6,177,092) in view of Farrell, et al., (US 6,063,390) and Guilbeaux (US 4,929,644) should be reversed.

The examiner asserts that it would have been obvious to combine the bicarbonate and acid in the same chamber when in an anhydrous composition of Lentini, et al., because it has been disclosed in the art that the two components do not react in a dry state and the two components have been disclosed by the art in combination in anhydrous skin care compositions, as supported by Farrell, et al.

The examiner further asserts that it would have been obvious to one of ordinary skill in the art to have used a combination of organophilic clays in the compositions of Lentini, et al., and Farrell, et al., motivated by the desire to incorporate a rheology modifier suitable for cosmetics that thickens the compositions as desired and acts as a biocidal agent and remove the need for other biocidal agents that may cause adverse reactions, as disclosed by Guilbeaux.

The examiner asserts in regards to claims 12 and 14, normally, changes in result effective variables are not patentable where the difference involved is one of degree, not of kind; experimentation to find workable conditions generally involves the application of no more than routine skill in the art. See MPEP 2144.05. It would have been obvious to one of ordinary skill in the art to use a particular particle size motivated by the desire to obtain a composition with optimal efficacy when the components are mixed and react with one another. Applicants respectfully traverse this rejection.

Applicants respectfully submit that a proper prima facie case under § 103(a) is not made out with respect to amended claim 1 at least because the disclosure of Lentini, et al., in view of Farrell, et al., and Guilbeaux fails to disclose a first component in a dispersed phase capable of chemically reacting with a second component and wherein both the first and second components are contained in the first chamber, (i.e., a single chamber).

Lentini, et al., relate to a self-foaming system having two components that are maintained in separate containers or separate compartments in the same container so that the components produce carbon dioxide when they commingle with each other upon being dispensed from their individual containers or compartments. See col. 4, lines 17-19. In another example of Lentini, et al., an anhydrous product contained in a sachet containing the (reactive) components of the system can be added to a bath (col. 3, lines 48-53). The skilled person reading Lentini, et al., would understand that the sachet must be a “unitary package with chambers” separately

containing each of the acid and bicarbonate so as to prevent their premature reaction with each other prior to being added to a bath.

The examiner asserts this interpretation is not correct. In response, applicants respectfully submit that the meaning of “sachet” must be gleaned by the skilled person from the overall disclosure of Lentini. The skilled person would interpret the phrase “For example, the present invention may be in the form of a sachet containing the components of the system that is added to a bath of water” (see col. 3, lines 48-53), in conformity with the phrase “the two reactive compounds can be dispensed from physically separate packages or from a unitary package with chambers (col. 4, lines 17-20). Applicants respectfully submit that the skilled person would therefore understand “sachet” to have the characteristics referred to in col. 4, lines 17-20 in support of applicants’ previous analysis of Lentini and in distinct contrast to the examiner’s interpretation.

Farrell, et al., relates to a wiping article containing an effervescent cleanser composition held within a unitary pouch (abstract). Farrell, et al., teaches that the blend must be an anhydrous dry powder ostensibly to avoid any premature reaction prior to the user applying the later wetted wiping article to the skin (col. 1, lines 40-41). Farrell, et al., teaches away from reducing the degree of intimate contact of the dry reactive materials by suspending them in the anhydrous carrier required in instant claim 1(c) because Farrell teaches that the desired result of the rapid effervescence created by the intimate blend being contacted with water is the production of “copious” lather. In other words, the skilled person would not have been motivated to reduce the intimate contact of the dry powder in Farrell, et al., by suspending such powder in an inert medium.

Guilbeaux relates to a thickened organic composition having two organophilic clays separately providing viscosity building and biocidal activity (see abstract). Applicants respectfully submit that the skilled person would not combine Farrell, et al.’s, teaching of an intimate quick reacting mixture with Guilbeaux’s organic clays for the reasons stated above regarding quick reaction to produce copious lather.

The examiner’s rejection of claims 10 and 11 under 35 U.S.C. 103(a) as being unpatentable over Lentini, et al., (US 6,177,092) in view of Farrell, et al., (US 6,063,390) and



Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Gentile, et al., (US 6,161,729) should be reversed.

Gentile, et al., discloses a dual-chambered dispenser having a pair of elongated hollow tubes containing separate flowable material streams and a manifold directing the flow through separate chambers. Gentile, et al., fails to remedy the deficiencies of Lentini, et al., with respect to claims 10 and 11 which depend from claim 1. Therefore, it is respectfully submitted that a prima facie case of obviousness under § 103(a) has not been made out with respect to claims 10 and 11.

The examiner's rejection of claims 5-6 and 8 under 35 U.S.C. 103(a) as being unpatentable over Lentini, et al., (US 6,177,029) in view of Farrell, et al., (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Hall, et al., (US 5,316,054) should be reversed.

Hall, et al., relates to a self-contained package for housing, dispensing and diluting concentrated liquid with a predetermined quantity of dilution liquid prior to use. Applicants respectfully submit that a proper prima facie case of obviousness under § 103(a) has not been made out with respect to claims 5, 6 and 8 because claim 5, 6 and 8 either depend from or ultimately depend from claim 1 and Hall, et al., fails to remedy the deficiencies of Lentini, et al., with respect to claim 1 and its dependent claims.

The examiner's rejection of claim 9 under 35 U.S.C. 103(a) as being unpatentable over Lentini, et al., (US 6,177,092) in view of Farrell, et al., (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Pettengill (US 5,020,694) should be reversed.

Pettengill discloses multi-cavity dispensing containers but says nothing about the composition contained therein. Pettengill therefore fails to remedy the deficiencies of Lentini, et al., Farrerll, et al., and Guilbeaux with respect to claim 9 which depends from claim 1.

## **VIII. CLAIMS APPENDIX**

1. A skin care or cleansing packaged product, comprising:
  - a. a container having a first chamber and a second chamber, each chamber having an outlet;
  - b. a composition contained in the first chamber having a dispersed phase including a first and a second component, the first component being capable of chemically reacting with the second component that is different from the first;
  - c. a continuous phase present in the composition composed of a substantially anhydrous carrier contained in the first chamber;
  - d. an organophilic particle stabilizer contained in the dispersed phase;
  - e. water contained in the second chamber;
  - f. wherein the first component is substantially unsolvated in the carrier; and
  - g. wherein the first and second components do not substantially react with water or each other until dispersed or dissolved in water during cleansing and skin treatment by a consumer.
2. The packaged product of claim 1 wherein the outlet of the first chamber and the outlet of the second chamber fluidly communicate with each other to allow mixing of the contents of the first and second chamber prior to deposition on the skin or hair of a user.
3. The packaged product of claim 1 wherein the outlet of the second chamber do not fluidly communicate with each other whereby the mixing of the contents of the first and second chamber occurs after deposition of the contents of the first and second chamber on the skin or hair of a user.

4. The packaged product of claim 2 wherein the dispersed phase in the first chamber has less than 25 % by wt. of the second component and less than 25% by wt. of the first component.
5. The packaged product of claim 1 wherein a cup is releasably attached to the container and positioned for receiving the contents of the first chamber.
6. The packaged product of claim 5 wherein the cup is marked with a fill line for introducing a measured amount of the contents of the second chamber.
8. The packaged product of claim 5 wherein the cup is positioned for receiving the contents of the second chamber.
9. The packaged product of claim 1 further comprising a unit dose pump.
10. The packaged product of claim 1 wherein the outlet of the first chamber contains a one way valve.
11. The packaged product of claim 10 wherein the valve is selected from a duckbill valve, a ball valve or a slit valve.
12. The packaged product of claim 1 wherein the at least one reactive component has a particle size range of about 0.1 to 5000  $\mu$ .
14. The packaged product of claim 1 wherein the organophilic particle is in the particle size range of about 0.02 to 250  $\mu$ .
15. The packaged product of claim 1 wherein the stabilizer is selected from organophilic silica, organophilic clay, or blends thereof.

18. The packaged product of claim 1 wherein the first component is capable of producing a gas in aqueous solution when reacted with an acid and the second component forms an acid in the presence of water.

**IX. EVIDENCE APPENDIX**

No evidence pursuant to 37 C.F.R. §§ 1.130, 1.131 or 1.132 or any other evidence has been entered by the examiner and relied upon by the appellant in this appeal.

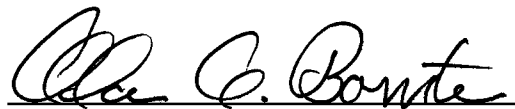
**X. RELATED PROCEEDINGS APPENDIX**

No decisions have been rendered by a court or the Board in any proceeding related to this appeal.

**CONCLUSION**

In view of the above, Appellants respectfully submit that a proper rejection under 35 U.S.C. § 103(a) has not been made. Accordingly, reversal of the Final Rejection by the Honorable Board is appropriate and is courteously solicited.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alan A. Bornstein", written over a horizontal line.

Alan A. Bornstein  
Registration No. 40,919  
Attorney for Applicant(s)

AAB/ss  
(201) 894-2180